(1)

Supreme Court, U.S.
FILED

03 216 AUG 7 2003

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

ALCUS SMITH AND KAY SMITH
Petitioners,

V.

CHEVRON U.S.A., INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

ROBERT R. WILLIARD
Post Office Box 2019
306 Maxey Drive, Suite A
Brandon, Mississippi 39043
(601) 824-1296

JOHN K. WESTON
Counsel of Record
Sacks, Weston, Smolinsky, Albert & Luber
510 Walnut Street, Suite 400
Philadelphia, Pennsylvania 19106
(215) 925-8200

Counsel for Petitioners

---

62 pp

QUESTION PRESENTED FOR REVIEW

Does the Equal Protection Clause prohibit a state from imposing, through judicial fiat, an expensive and time-consuming procedural burden only upon a discrete class of landowners, thus restraining class members' right to seek legal relief for injury, where neither the legislature, the fact finder, nor any other source has provided a rational basis for the discriminatory treatment?

PARTIES TO THE PROCEEDING

Alcus Smith and Kay Smith, husband and wife:

Plaintiffs in the Circuit Court of Hinds County, Mississippi;
Appellees in the Supreme Court of Mississippi;
Petitioners before this Court.

Chevron U.S.A., Inc.:

Defendant in the Circuit Court of Hinds County, Mississippi;
Appellant in the Supreme Court of Mississippi;
Respondent before this Court.

Three other corporations - **Chevron Corporation, Coho Resources, Inc.** and **Florabama, Inc.** - were parties to the trial court litigation, but were either dismissed pursuant to summary judgment motion before trial (Coho Resources, Inc. and Florabama, Inc.) or were not found liable by the jury at trial (Chevron Corporation). Therefore they were not parties to the proceedings in the Mississippi Supreme Court.

TABLE OF CONTENTS

Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Petition for Writ of Certiorari	1
Opinions and Orders Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Argument	5
The disparate treatment	7
The injury	8
The lack of rational basis	10
Conclusion	18
Appendices	
Appendix A - Opinion, *Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145 (Miss. 2002)	1a
Appendix B - Order of October 17, 2002	15a
Appendix C - Order of May 22, 2003 denying Motion for Rehearing, and Mandate	16a
Appendix D - Excerpts from Petitioners' Motion for Rehearing	17a
Appendix E - Excerpts from Respondents' Response to Motion for Rehearing	29a

TABLE OF CITED AUTHORITIES

Allgood v. Allgood, 473 So.2d 416 (Miss.1985) 13

American Fire Protection, Inc. v. Lewis,
653 So.2d 1387 (Miss.1995) 15

Avery v. Midland County, Tex., 390 U.S. 474,
88 S.Ct. 1114, 20 L.Ed.2d 45 (1968) 6

Bell v. City of Bay St. Louis, 467 So.2d 657
(Miss.1985) 13

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691,
7 L.Ed.2d 663 (1962) 9

Booker ex rel. Certain Underwriters at Lloyd's
of London v. Pettey, 770 So.2d 39 (Miss. 2000) 13

Brandon HMA, Inc. v. Bradshaw,
809 So.2d 611 (Miss. 2001) 13

Burney v. State, 515 So.2d 1154, 1160
(Miss.1987) 14

Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401,
3 L.Ed.2d 5 (1958) 6

Corbello v. Iowa Production, ___ So.2d ___,
2003 WL 536727, 2002-0826 (La. 2/25/03),

rehearing granted in part, ___ So.2d ___,
2003 WL 21417579, 2002-0826 (La. 6/20/03) 8, 17

Donald v. Amoco Production Co.,
735 So.2d 161 (Miss.1999) 6,10,11,17,18

Elsworth v. Glindmeyer, 234 So.2d 312
(Miss. 1970) 13

Hamner v. Yazoo Delta Lumber Co.,
100 Miss. 349, 56 So. 466 (1911) 17

Herrington v. Spell, 692 So.2d 93 (Miss. 1997) 13

Ill. Cent. R. Co. v. Williams, 242 Miss. 586,
135 So.2d 831 (1961) 13

Junior Food Stores, Inc. v. Rice, 671 So.2d 67
(Miss.1996) 13

Mason v. State, 440 So.2d 318 (Miss.1983) 14

McDerment v. Miss. Real Estate Comm'n,
748 So.2d 114 (Miss.1999) 14

McLaughlin v. State of Florida, 379 U.S. 184,
85 S.Ct. 283, 13 L.Ed.2d 222 (1964) 10

Michigan v. Long, 463 U.S. 1032,
103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 5

Oakwood Homes Corp. v. Randall,
824 So.2d 1292 (Miss. 2002) 15

Phillips v. State, 421 So.2d 476 (Miss.1982) 14

Prudential Ins. Co. of America v. Cheek,
259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 10 44,
27 A.L.R. 27 (1922) 6

R & S Development, Inc. v. Wilson, 534 So.2d 1008 (Miss. 1988) 7

Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) 10

Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) 8

Scott Prather Trucking, Inc. v. Clay ex rel. Sanders, 821 So.2d 819 (Miss. 2002) 13

Starcher v. Byrne, 687 So.2d 737 (Miss.1997) 13

State v. Heard, 151 So.2d 417 (Miss. 1963) 17

Teledyne Exploration Company v. Dickerson, 253 So.2d 817 (Miss. 1971) 7

Touchstone v. Touchstone, 682 So.2d 374 (Miss.1996) 15

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) 9

Wallace v. Town Of Raleigh, 815 So.2d 1203 (Miss. 2002) 17

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) 9

Yancey v. Yancey, 752 So.2d 1006, 1012 (Miss. 1999) 15

Miss. Code Ann. §53-1-29 2, 11

PETITION FOR WRIT OF CERTIORARI

Petitioners Alcus and Kay Smith respectfully petition this Court for a writ of certiorari to review a judgment of the Supreme Court of Mississippi, entered in this proceeding on October 17, 2002.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Mississippi is reported at 844 So.2d 1145 and is reproduced in Appendix A, beginning at 1a. The May 22, 2003 order denying the Smiths' Motion for Rehearing has not, as yet, been reported; it is reproduced in Appendix C, at 16a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on October 17, 2002. By order of May 22, 2003 that court denied a timely filed motion for rehearing. Jurisdiction exists under 28 USC §1257(a), pursuant to which final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari .... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution....

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Miss. Code Ann. §53-1-29 provides:

> § 53-1-29. Hearing request.
>
> Any interested person shall have the right to have the board call a hearing for the purpose of taking action in respect to any matter within the jurisdiction of the board by making a request therefor in writing. Upon the receipt of any such request, the board promptly shall call a hearing thereon, and, after such hearing and with all convenient speed, and in any event within thirty (30) days after the conclusion of such hearing, shall take such action with regard to the subject matter thereof as it may deem appropriate.

STATEMENT OF THE CASE

Facts and Procedural History

In 1979 Alcus and Kay Smith purchased a 55-acre tract of land in Lincoln County, Mississippi, upon which they intended to build their future retirement home. Years later, the Smiths discovered that their land, and the groundwater beneath it, was contaminated by oil field waste. Much of the waste was toxic; some of it was radioactive.[1]

The Smiths sued the oil companies responsible for contaminating the land. The litigation was expensive and time-consuming. Lengthy, protracted discovery produced tens of thousands of documents and multiple depositions of expert and fact witnesses. The delays inherent in litigation against large corporate defendants were compounded by the bankruptcy of one of the oil companies.

The case was finally tried to a jury, over a period of seven weeks, in February, March and April, 1999. The testimony revealed that Chevron had not only introduced toxic materials to the soil and groundwater in the Brookhaven Oil Field, where the Smiths' property was located, but had done so knowingly since the 1950s. Despite the recommendations of its own employees, Chevron refused to make any effort to cease the contamination, much less to clean it up. Instead, Chevron sold the field to a small oil company (Florabama, which filed for bankruptcy on the eve of the first scheduled trial date).

The Smiths' experts testified that, in order to rid the Smiths' property of the toxic materials that contaminate the surface, it will be necessary to literally remove the topsoil from the property and deposit it at a nuclear waste facility,

---

[1]Dr. Thomas Schrager, a toxicologist, testified that the Smiths' property and the Brookhaven Field should not be utilized for human habitation, especially for children. After the passing of 1,620 years - that is to say, sometime in the early 37th Century - only one-half of the Radium 226 on the Smiths' property will have decayed.

at a total cost of $2,349,275.00. The jury returned a compensatory damage verdict in favor of the Smiths and against Chevron in precisely this amount.[2]

Following the jury's compensatory award, the trial court submitted the question of punitive damages to the jury. The jury ultimately deadlocked on that issue, resulting in a mistrial on the punitive damage phase. Post-trial motions were filed by both sides, and, after briefing and argument, were denied. Cross appeals were taken to the Mississippi Supreme Court.

The Supreme Court of Mississippi reversed the judgment of the trial court. For purposes of the instant petition, it is important that no new evidence, of any sort, was presented to the Mississippi Supreme Court as part of the appeal. The decision sought to be reviewed in this Court was founded entirely upon the record made at trial.

Preservation of the Constitutional Issues

The federal issue arose after the trial and not until the Supreme Court of Mississippi published its opinion, which first created the disparate treatment at issue here. The Smiths promptly filed a motion for rehearing, raising state issues as well as the federal equal protection problem.[3] Chevron's response also addressed the constitutional question.[4] The Mississippi Supreme Court's denial of the

---

[2]All but two of the original defendants had been dismissed from the case before trial began. Chevron Corporation, the parent company of Chevron, U.S.A., was not found liable by the jury.

[3]The pertinent portion of the Smiths' motion for rehearing is reproduced in Appendix D, beginning at 17a.

[4]The pertinent portion of Chevron's response to the motion for (continued...)

motion for rehearing must therefore be assumed to be deliberate.[5] Because no independent state grounds for resolving the Equal Protection issue were announced, it is presumed that they did not exist. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

ARGUMENT

Section One of the Fourteenth Amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." The State of Mississippi, acting through its supreme court, has violated the Equal Protection Clause by its promulgation of the opinion in this case. Owners of land contaminated by radioactive oil field waste are now required to jump through hoops which do not constrain other landowners, at significant cost in time and treasure. Where previously they had two options available to redress their injuries - through a civil suit or through an administrative proceeding - they now have only one. The means of the state's infliction of this injury are through judicial fiat rather than legislative enactment. No rational basis supports the disparate treatment. The Mississippi Supreme Court's stated rationale was based upon facts which had been rejected by the factfinder. Indeed, the court was required to ignore its own jurisprudence in order to reach its desired result. Significantly, the Mississippi legislature itself expressed no need for the disparate treatment.

---

[4](...continued)
rehearing is reproduced in Appendix E, beginning at 29a.

[5]The Supreme Court of Mississippi's order denying the motion for rehearing is reproduced in Appendix C, at 16a. No separate opinion accompanied the order.

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State. "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action...." *Cooper v. Aaron*, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5 (1958).[6]

The Equal Protection issue was squarely presented to the Mississippi Supreme Court. That court's silence is the equivalent of its assertion that the Equal Protection Clause does not bar this discriminatory result. Consequently the highest court of the State of Mississippi has decided an important issue of federal law - whether the Equal Protection Clause bars injurious, disparate treatment of individuals without meeting at least a rational relationship test - in a manner at odds with all relevant decisions of this Court. In addition, the case is of significant public interest. The *Smith* decision already binds and oppresses the citizens of Mississippi.[7] It may be expected to be used as support for similar judicial activism in other jurisdictions. It discourages - if it does not, in fact, prohibit - private enforcement of

---

[6]*Avery v. Midland County, Tex.*, 390 U.S. 474, 479-480,88 S.Ct. 1114, 1117-1118, 20 L.Ed.2d 45 (1968). An adverse decision by the state court of last resort upon any right, title, privilege, or immunity especially set up or claimed under the Constitution or laws of the United States is treated in the same manner as if the state legislature had enacted such a statute. *Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 10 44, 27 A.L.R. 27 (1922).

[7]Ironically, the case which was cited as the foundation for the *Smith* opinion, *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss.1999), has since been dismissed - based upon the *Smith* opinion!

environmentally-sound policies - a signal transmitted by judicial decree, rather than by legislative process.

The disparate treatment

For all practical purposes, Mississippi has always permitted landowners to recover in a civil action for damage to their real property. Mississippi courts have consistently held that "where damage to land is temporary and subject to restoration, the proper measure of damage is the cost of restoration."[8] The Supreme Court of Mississippi has followed this doctrine even where the cost of restoration has exceeded the diminution in the property's market value.[9]

The *Smith* opinion changed this - but only for landowners whose properties have been contaminated by oil field waste which falls within the jurisdiction of the Mississippi Oil and Gas Board (OGB). As to that class of people, the Supreme Court of Mississippi has now announced an irrebuttable presumption that their recovery of the cost of restoration is, *per se*, unjust enrichment, and will no longer be permitted. Owners of land damaged by other, non-oil field waste substances, retain their right to recover the cost of restoration. The distinction, therefore, is entirely dependent upon the manner in which the injury is inflicted upon the property owner. Had Chevron simply scattered radium - or arsenic, or any other toxic substance - on the

---

[8] *R & S Development, Inc. v. Wilson*, 534 So.2d 1008, 1012 (Miss. 1988).

[9] See *Teledyne Exploration Company v. Dickerson*, 253 So.2d 817, 819 (Miss. 1971). A contractor whose blasting damaged plaintiffs' home was required to pay the cost of repair; his effort to introduce the presumably lower cost of diminished value was denied, and this was affirmed by the Supreme Court of Mississippi.

Smiths' property, the Smiths' suit would have been perfectly proper.

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance....A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[10]

The injury

As to the Smiths, of course, the injury arising from the disparate treatment is onerous. The extensive costs invested in their trial, the years which have been devoted to the litigation, are dwarfed by the time which must be invested in doing it all over again - this time with the added step of pursuing a dubious administrative proceeding before the Mississippi Oil and Gas Board.[11] The Smiths have thus

---

[10]*Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996).

[11]In an opinion highly critical of the *Smith* decision, the Supreme Court of Louisiana recently observed: "However, we also recognize the policy concern asserted by plaintiffs in that if landowners cannot sue for cleanup costs - especially where, as here, they have a contract in hand - it would leave only understaffed and underfunded state agencies to oppose the oil companies. In this situation, there is still a strong possibility that the land will remain polluted." *Corbello v. Iowa Production*, ___ So.2d ___, 2003 WL

(continued...)

"alleged such a personal stake in the outcome of the controversy' (as) to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf."[12]

The injuries to the broader landowner class (those whose land is afflicted by oilfield waste) are similar to the Smiths'. They must now submit themselves to the jurisdiction of an agency which has never demonstrated an inclination to order oil companies to clean up their pollution.[13] They must incur the additional expense incident to the exercise, and devote the additional time to the process. Most dramatically, if (as expected) the OGB should *not* order a cleanup, the landowners *will never be permitted to recover the cost necessary to clean up their land.* This is because the remediation costs will almost always exceed the diminished market value, particularly in rural Mississippi,

---

[11](...continued)
536727, 2002-0826 (La. 2/25/03), *rehearing granted in part*, ___ So.2d ___, 2003 WL 21417579, 2002-0826 (La. 6/20/03).

[12]*Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). *Accord*: *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

[13]For example, in all the decades Chevron operated the Brookhaven field, the Oil and Gas Board did, precisely, nothing. Film introduced at the trial showed that the OGB had actual knowledge of the contamination in the Brookhaven Field by the late 1980s. Despite this, the Board never ordered a cleanup of the Smiths' property, or of ***any*** property in the field, not in the 50 years Chevron contaminated the land, not in the 16 years since Chevron told the EPA and the OGB that there was NORM on and under the land, not in the seven years of the Brookhaven litigation, and not to the present day.

and the supreme court of that state has now ruled that such a recovery amounts, in all cases, to unjust enrichment.

The lack of rational basis

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. *McLaughlin v. State of Florida*, 379 U.S. 184, 189-190, 85 S.Ct. 283, 286-287, 13 L.Ed.2d 222. It also imposes a requirement of some rationality in the nature of the class singled out.[14]

Denial of equal protection is permissible if a certain level of state interest supports the disparate treatment. At minimum, a rational basis is required to justify the imbalance [cite]. Although the Supreme Court of Mississippi attempted to supply such a foundation for its judicial legislation, it is clear that no such justification exists.

First: The court's primary stated reason for its ruling - that precedent mandated such a result - is patently false.

The *Smith* opinion very plainly, and very broadly, holds that a landowner is not permitted to prosecute a civil action to recover damages caused by radioactive oilfield contamination unless he has first exhausted his administrative remedies at the Oil and Gas Board. The opinion is explicitly based on the court's earlier ruling in *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss.1999). "This Court cannot ignore *Donald* and fail to force the Smiths to seek relief from the Oil and Gas Board

---

[14]*Rinaldi v. Yeager*, 384 U.S. 305, 308-309, 86 S.Ct. 1497, 1499, 16 L.Ed.2d 577 (1966).

before filing suit in the trial court."[15] Yet *Donald* reached no such result; in fact, *Donald* required the landowner to exhaust administrative remedies only for claims based upon administrative agency regulations. *Donald* permitted the landowners to continue prosecuting all other claims.[16] The *Donald* opinion expressly observed that "the [oil and gas] statutes and regulations do not provide for or prohibit private causes of action."[17] The *Donald* opinion, therefore, provides only a pretext for the result in *Smith*.

Second: To the extent that the court perceived that Mississippi's statutory and regulatory scheme required an exhaustion of Oil and Gas Board remedies, that conclusion was unsupported by any evidence placed before the court. The statute does not require pursuit of an administrative remedy, as the Mississippi Supreme Court observed in *Donald*.[18] No testimony was presented, at trial or otherwise,

---

[15]*Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145, at 1148 (Miss. 2002).

[16]The *Donald* opinion discusses, at some length, each of these surviving claims: nuisance, trespass and strict liability; nuisance *per se*; negligence; breach of contract; and intentional infliction of emotional distress. Only negligence *per se*, i.e. negligence based upon violation of oil and gas regulations, was dismissed for failure to exhaust administrative remedies. The Smiths, in their trial, prevailed upon ordinary principles of negligence, a claim which the *Donald* court remanded to the trial court for further proceedings.

[17]*Donald v. Amoco Production Co.*, 735 So.2d 161, 177 (Miss. 1999).

[18]Miss. Code Ann. §53-1-29 provides only that "[a]ny interested person shall have the right to have the board call a hearing for the purpose of taking action in respect to any matter within the (continued...)

on that topic. Indeed, the *Smith* opinion itself does not purport to find any such legislative mandate.

Third: The issue which appears to have been strongest in the court's mind - that the Smiths would not spend their recovery on cleaning up the contamination - was a fact question which was rejected by the jury at trial. Under the Mississippi Supreme Court's own precedent, such a jury finding was binding on appeal.

The central assumption of the *Smith* opinion is that the Smiths will not spend their recovery to restore their property:

> Nor will this Court allow a windfall to the plaintiffs who obviously have no intention of cleaning up their property since they have refused all such offers of cleanup.[19]

This holding flies in the face of decades of well-established law in Mississippi.

The Supreme Court of Mississippi has long held that the jury's findings of fact are entitled to deference on appeal. The jury necessarily found that the Smiths intended to spend their recovery on removal of the radioactive contamination. Mr. Smith so testified. Chevron strenuously argued to the jury that the Smiths would keep the money and not perform the cleanup; the jury's award of the exact cleanup costs

---

[18](...continued)
jurisdiction of the board by making a request therefor in writing."

[19]*Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145, at 1148 (Miss. 2002).

clearly rejected this argument.[20] The fact question was thus resolved, by the jury, in the Smiths' favor.

It is black letter law in Mississippi, as elsewhere, that the jury's findings of fact are conclusive on appeal:

> On appeal, this Court must give deference to the factual conclusions reached by the jury. Findings of fact supported by credible evidence may not be set aside on appeal. *Allgood v. Allgood,* 473 So.2d 416 (Miss.1985).[21]

The *Smith* opinion, therefore, does not simply ignore the jury's finding. It actually reaches the opposite conclusion.

Another well- and long-established principle of appellate review in Mississippi is that an appellate court must view the facts in the verdict winner's favor.

> Since the jury's verdict was in favor of the defendants, as an appellate court "we must

---

[20]Both sides agree that the jury's award was the exact cost of cleanup, according to plaintiffs' experts.

[21]*Herrington v. Spell*, 692 So.2d 93, 99 (Miss. 1997). Accord: *Scott Prather Trucking, Inc. v. Clay ex rel. Sanders*, 821 So.2d 819 (Miss. 2002) (If evidence is contradicted, the reviewing court will defer to the jury, which determines the weight and worth of testimony and the credibility of the witness at trial); *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611 (Miss. 2001) (Appellate court reviews evidence as a whole, taken in light most favorable to the jury's verdict, and will reverse only if no reasonable, hypothetical juror could have found as jury found); *Booker ex rel. Certain Underwriters at Lloyd's of London v. Pettey*, 770 So.2d 39 (Miss. 2000) (Appellate court gives substantial deference to a jury's findings of fact and to the trial judge's determination that a jury issue was present and tendered).

> view the facts in the light most favorable to them, and consider as true all evidence in their favor, together with all reasonable inferences which may be drawn therefrom." *Ill. Cent. R. Co. v. Williams*, 242 Miss. 586 at 594, 135 So.2d 831 at 833 (1961).[22]

In finding that the Smiths "obviously have no intention of cleaning up their property since they have refused all such offers of cleanup," the Supreme Court of Mississippi ignored that principle. Viewed in the light most favorable to the verdict winners, the cleanup offer, such as it was, was made too late (on the eve of trial) and was too vague to have any value. The Smiths' refusal of Coho's cleanup offer did not signify the Smiths' refusal to clean up their land. Indeed, it meant just the reverse: the Smiths insisted on recovering the actual cost of an adequate cleanup so that it could be done the right way, and not the obviously insufficient cleanup proposed by COHO. In the long history of oil field contamination, oil companies have not been famous for conducting environmentally responsible cleanups. In the particular context of the Brookhaven Field, evidence of prior oil company attempts to clean up contamination obviously put the Smiths on notice that if they wanted the job done right, they would have to do it themselves.

Consistent with general principles of appellate review, Mississippi holds that an appeal must be decided on the basis of facts which appear in the record, not statements made in the briefs.

> We must "decide each case by the facts shown in the record, not assertions in the brief ...."

---

[22] *Elsworth v. Glindmeyer*, 234 So.2d 312, 326 (Miss. 1970). Accord: *Starcher v. Byrne*, 687 So.2d 737, 739 (Miss.1997); *Junior Food Stores, Inc. v. Rice*, 671 So.2d 67, 76 (Miss.1996); *Bell v. City of Bay St. Louis*, 467 So.2d 657, 660 (Miss.1985).

> *Burney v. State,* 515 So.2d 1154, 1160 (Miss.1987) (quoting *Mason v. State,* 440 So.2d 318, 319 (Miss.1983)). *Accord, McDerment v. Miss. Real Estate Comm'n,* 748 So.2d 114, 120 (Miss.1999); *Phillips v. State,* 421 So.2d 476, 478 (Miss.1982) ("[C]onsideration of matters on appeal is limited *strictly* to matters contained in the trial record ....") (emphasis in original). "[O]ur review ... will include only those facts actually contained in the record and to those arguments contained in the appellant's brief, the appellee's brief, and the appellant's rebuttal brief." *Id.*[23]

One of the troublesome aspects of the *Smith* decision is that it is founded on "facts" which appeared only in Chevron's briefs. Thus, for example, the Court found that

> [a]fter trial, COHO filed for bankruptcy. Chevron and COHO entered into an agreement for removing equipment and soil containing NORM from the entire Brookhaven field, which was approved by the Bankruptcy Court, the Mississippi Oil and Gas Board, ("Board) and the Mississippi Department of Health. Many plaintiffs who sought relief in Lincoln County from the same defendants have allowed the cleanup. The Smiths filed this lawsuit immediately upon

---

[23]*Oakwood Homes Corp. v. Randall,* 824 So.2d 1292, 1293 (Miss. 2002). Accord: *Yancey v. Yancey,* 752 So.2d 1006, 1012 (Miss. 1999) ("This Court, however, considers only those facts that actually appear in the record and will not rely on mere assertions in briefs. *Touchstone v. Touchstone,* 682 So.2d 374, 380 (Miss.1996); *American Fire Protection, Inc. v. Lewis,* 653 So.2d 1387, 1390 (Miss.1995)").

learning of the contamination and have continued to refuse the cleanup.[24]

None of these "facts" is supported by the record in this case. Most of them are inaccurate, if not actually false. For example, Chevron's Brookhaven cleanup plan has never been approved by either the Oil and Gas Board or the Department of Health. Instead, Chevron and COHO obtained a letter written by one official of each of those agencies, which indicated that the plan appeared to comply with regulations. There has never been a hearing conducted under the Oil and Gas Board's regulations to test the sufficiency of the plan. Similarly, the Dallas bankruptcy court never "approved" the plan in terms of the plan's adequacy under any sort of cleanup standard. Indeed, the bankruptcy court specified that landowners could challenge the cleanup plan if and when Chevron tried to implement it on their land. And the cleanup offered to the Smiths by COHO on the eve of trial is not the same as the Brookhaven field cleanup (the latter plan appears to have been drafted well after the verdict in the Smith case).

These findings were important foundations of the *Smith* opinion. Yet they are not facts, and they do not appear in the record. They do not provide a rational basis for the court's disparate treatment.

Fourth: By grafting onto the statute an exhaustion of administrative remedies requirement, the *Smith* court invaded the province of the legislature. This is a separation of powers violation clearly prohibited by the Mississippi Constitution, and can therefore not serve as a rational basis for imposing unequal treatment on Mississippi landowners.

The core of the *Smith* opinion is this:

---

[24] *Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145, at 1147 (Miss. 2002).

> Since no court can order the plaintiffs in this case to expend the award on decontaminating the property, the outcome allowed by the trial court does nothing to protect the citizens of Mississippi from the dangers of NORM contamination.[25]

As the Supreme Court of Louisiana observed in *Corbello*, the Mississippi Supreme Court here "merely expressed its sentiment that the citizens of Mississippi are better served by resorting to the regulatory agency rather than waiting for the private landowner to bring an action for damages where there is no guarantee that the pollution would be eradicated."[26] The Mississippi Constitution, however, does not permit a court to convert its "sentiment" into legislation. Courts in that state cannot amend statutes by judicial construction; *State v. Heard*, 151 So.2d 417 (Miss. 1963).

> The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the Legislature. Neither have the courts authority to write into the statute something which the Legislature did not itself write therein, nor can they ingraft upon it any exception not done by

---

[25] *Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145, at 1148 (Miss. 2002).

[26] *Corbello v. Iowa Production*, ___ So.2d ___, 2003 WL 536727, 2002-0826 (La. 2/25/03), *rehearing granted in part*, ___ So.2d ___, 2003 WL 21417579, 2002-0826 (La. 6/20/03). The Louisiana Supreme Court, in *Corbello*, rejected the *Smith* result and preserved the landowner's right to maintain an action for recovery of restoration costs.

> the lawmaking department of the government.[27]

The Mississippi Supreme Court had noted in *Donald* that the statutes and regulations establishing and governing the Oil and Gas Board "do not provide for or prohibit private causes of action."[28] Yet the *Smith* decision now prohibits a private cause of action to recover restoration costs. Indeed, it goes further, and judicially creates a requirement to prosecute a proceeding before a state agency, although the legislation establishing that agency contains no such requirement. The result violates Mississippi's separation of powers doctrine, as contained in Article 1, Section 1 of the Constitution.[29] The Mississippi legislature might have the resources and authority to enact legislation requiring an exhaustion of Oil and Gas Board remedies, but it has not done so. The Mississippi Supreme Court, as it has repeatedly stated, cannot, because it lacks the constitutional authority to convert sentiment to statute.

In the end, there is no rational basis supporting the unequal treatment of Mississippi landowners created by the *Smith* opinion.

---

[27] *Hamner v. Yazoo Delta Lumber Co.,* 100 Miss. 349, 56 So. 466, 490 (1911), cited in *Wallace v. Town Of Raleigh*, 815 So.2d 1203, 1208 (Miss. 2002).

[28] *Donald v. Amoco Production Co.*, 735 So.2d 161, 177 (Miss. 1999).

[29] "The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."

CONCLUSION

The law of Mississippi now treats similarly-situated people unequally. It imposes an injury on landowners who have the additional misfortune to have suffered contamination of their property by oil field waste. There is no rational basis for making such a distinction. The statutory law of Mississippi does not call for such a result. The other reasons relied upon by the Mississippi Supreme Court are pretextual, because they fly in the face of that court's longstanding jurisprudence. The fundamental reason for the decision is the court's legislative finding, which the Mississippi Constitution prohibits the court from making. There are no rational bases for the disparate treatment imposed by the court.

That the *Smith* opinion violates the Equal Protection Clause has been pointed out to that court, and the court has refused to remedy the violation. The highest court of the State of Mississippi has therefore decided an important issue of federal law, in a manner which calls for this Court to grant certiorari and reverse the violation.

Respectfully submitted,

JOHN K. WESTON
Counsel of Record
ANDREW B. SACKS
Sacks, Weston, Smolinsky, Albert & Luber
510 Walnut Street, Suite 400
Philadelphia, PA 19106
(215) 925-8200

ROBERT R. WILLIARD
Post Office Box 2019
306 Maxey Drive, Suite A
Brandon, MS 39043
(601) 824-1296

STUART H. SMITH
Smith Stag, LLC
2850 One Canal Place
365 Canal Street
New Orleans, LA
(504) 593-9600

JOHN W. BOLING
2120 Fourth Street
Suite 300
Meridian, MS 39302
(601) 693-6750

ROBERT L. JOHNSON, III
Post Office Box 1678
Natchez, MS 39120
(601) 442-9371

JACK G. PRICE
118 Third Street
Post Office Box 461
McComb, MS 39648
(601) 249-0015

Counsel for Petitioners